

34530-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL H. CAMPBELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The trial court refused to exercise its discretion as to whether a sentencing alternative was appropriate.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it imposed a mid-point, 90-month sentence, as opposed to a low end of the standard range sentence of 81 months as requested by the defense?

2. Has the defendant established the trial court failed to comply with a procedural requirement of the SRA or a constitutional requirement which would allow him to appeal a standard range sentence which is generally not appealable under RCW 9.94A.585(1)?

III. STATEMENT OF THE CASE

Procedural history.

Mr. Campbell was charged by information in the Spokane County Superior Court with second degree assault and attempted first degree robbery for offenses taking place on August 15, 2015. CP 1. Each crime contained a deadly weapon allegation. CP 1. The matter proceeded to a jury trial, and Mr. Campbell was convicted of both counts, each with a deadly weapon finding. CP 131, 132, 134, 135.

At the time of sentencing, the trial court determined that the second degree assault and attempted first degree robbery merged, and the court only

sentenced on the greater offense, attempted first degree robbery. RP 341; CP 211-212.

With an offender score of “8” and a prior 2007 finding that Mr. Campbell used a deadly weapon during the commission of an attempted first degree robbery, Mr. Campbell was sentenced to a 90-month sentence plus an additional 24 months for the deadly weapon finding, for a total of 114 months. CP 219-21; RP 342.

Substantive facts.

Angelique Sam had known Mr. Campbell for a period of time. RP 46. The pair had an arrangement whereby Mr. Campbell would provide controlled substances to Ms. Sam, she would sell the drugs, and would then remit any money to Mr. Campbell. RP 47.

Ms. Sam had approximately \$150 still outstanding to give to Mr. Campbell for the sale of methamphetamine. RP 47, 104. Approximately one to two weeks before the incident, Mr. Campbell arrived uninvited at Ms. Sam’s apartment at 1724 East Desmet Avenue in Spokane. RP 48, 57, 105. Ms. Sam told Mr. Campbell she had tried to contact him, she did not have the \$150 at that time, but she intended on giving the money to Mr. Campbell. RP 49. The gathering was cordial and the two remained on good terms. RP 48. 49. Mr. Campbell then left the apartment. RP 48.

Several days later, Ms. Sam and Mr. Campbell discussed how she could repay the \$150 to him. RP 49. Over a three or four day period, Ms. Sam and her boyfriend had given Mr. Campbell approximately \$60, an amount of methamphetamine and heroin in lieu of money, and she allowed Mr. Campbell to stay at her apartment for three or four days. RP 48, 50, 107-08, 110. Thereafter, Ms. Sam and Mr. Campbell had a disagreement as to whether the debt had been paid in full. RP 50-51.

As days passed, Mr. Campbell became more adamant about the disputed amount of money owed to him, confronting Ms. Sam several more times at her apartment. RP 52-53, 55. Ms. Sam felt increasingly intimidated by Mr. Campbell. RP 55.

In the early evening on August 24, 2015, Mr. Campbell walked through the alley with a young adult male and arrived unsolicited at Ms. Sam's apartment. RP 57-59, 130, 153, 164. The conversation with Ms. Sam was cordial at first, but a disagreement ensued over the disputed money owed to Mr. Campbell. RP 63, 65, 68-69, 116, 133. Eventually, Mr. Campbell shoved Ms. Sam sideways against a wall. RP 69-70.¹ Contemporaneously, Mr. Campbell produced a knife with an approximate

¹ During this time, the unidentified male "slammed" shut the door to the residence. RP 78.

four inch blade, and “flicked” it open. RP 71, 134, 138, 149. Mr. Campbell informed Ms. Sam that he was not “somebody that you fuck around with.” RP 74. Mr. Campbell told Ms. Sam that he would kill her, and he nicked her with the knife blade on the chest and her neck, as he knocked all of the items off of a table. RP 75-76, 118.²

A struggle ensued and Mr. Campbell demanded the disputed money or something of like value. RP 76. Mr. Campbell became angrier, and, at one point, held the knife under Ms. Sam’s chin. RP 77.³ Mr. Campbell moved away from Ms. Sam and the unidentified male pleaded with Mr. Campbell to leave the apartment. RP 80, 82. Ms. Sam was bleeding and soaked in her own blood at this point.⁴ RP 81. Mr. Campbell made another demand for the money and then left the apartment without taking any property. RP 81, 83-84, 123. Ms. Sam did not have the opportunity to arm

² An eight-year-old child was in the residence at the time of the incident. RP 135. She experienced nightmares afterward. RP 143-44.

³ Ms. Sam also had a cut on her index finger as a result of trying to keep the weapon at a distance. RP 89-90. In addition to the cuts, Ms. Sam suffered contusions to her left shoulder, shoulder blade, left knee, leg, and on her trachea. RP 91-92, 94.

⁴ A detective took several photographs of Ms. Sam’s injuries two days after the incident, which included a bruise on the right side of her neck, and a puncture or a laceration just to the left of that bruise. RP 176. The photos also documented cuts or lacerations to Ms. Sam’s hands and bruising about her body.

or defend herself during the encounter. RP 103. After the incident, Mr. Campbell and his associate ran from the residence and toward a vehicle parked two to three blocks away. RP 137-38. The pair entered the car and drove toward Sprague Avenue. RP 138.

Mr. Campbell testified and stated he had given some drugs to Ms. Sam with the expectation that she would pay him later in the evening that same day the drugs were given to her. RP 200-01. Mr. Campbell denied receiving any money from Ms. Sam. RP 201.

Mr. Campbell asserted that prior to the incident, there was an expectation that he drop by Ms. Sam's residence. RP 204. On the day of the incident, Mr. Campbell claimed he was motioned to enter the apartment by Ms. Sam. RP 206. During his stay, his conversation with Ms. Sam turned toward the purported debt owed to Mr. Campbell. RP 208. Mr. Campbell claimed Ms. Sam had given him the knife used during the incident as payment in lieu of cash, and he denied pointing it at Ms. Sam. RP 210-11, 231-32, 234. Mr. Campbell further alleged that Ms. Sam held a high speed dremel tool against his chest and she eventually "stabbed" him with the tool drawing blood. RP 211-13, 239.

Mr. Campbell maintained that when he pushed Ms. Sam in an effort to avoid the "dremel" tool, Ms. Sam was inadvertently cut in the throat and other areas of the body with the knife he had in his hand, given to him by

Ms. Sam. RP 237. Mr. Campbell also claimed he dropped the knife on the floor in the kitchen, but it was not observed or found when the residence was searched by law enforcement. RP 249, 267. Mr. Campbell finally asserted he fled the scene because he allegedly had previously observed a firearm in Ms. Sam's residence on a different occasion. RP 239, 247-48.

At the conclusion of trial, the court instructed the jury on self-defense and the inferior degree offense of fourth degree assault. RP 284-86, CP 114-120. Mr. Campbell was convicted as charged.

IV. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A MID-POINT STANDARD RANGE SENTENCE AS OPPOSED TO A LOW END SENTENCE AS REQUESTED BY THE DEFENSE.

Mr. Campbell asserts the trial court abused its discretion by failing to consider his request to mitigate his sentence below the standard range. App. Br. 4-8. Mr. Campbell did not request a downward departure from the sentencing range. This claim falters for several reasons.

Standard of review.

"A sentence within the standard sentence range ... for an offense shall not be appealed." RCW 9.94A.585(1). Generally a party cannot appeal a standard range sentence. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Judges are afforded "nearly unlimited discretion" in determining an appropriate sentence within the standard range.

State v. Mail, 121 Wn.2d 707, 711-12 n. 2, 854 P.2d 1042 (1993). “[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” *Williams*, 149 Wn.2d at 146-47, 65 P.3d 1214; *see also State v. Medrano*, 80 Wn. App. 108, 111-12, 906 P.2d 982 (1995).

Notwithstanding the general prohibition against review of standard range sentences, a party may challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. *Williams*, 149 Wn.2d at 147. “Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.” *Id.* at 147; *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Consequently, an appellate court may review a standard range sentence resulting from constitutional error, procedural error, an error of law, or the trial court’s failure to exercise its discretion. *See, e.g., Williams*, 149 Wn.2d at 147 (the State can appeal a trial court’s determination of a defendant’s eligibility for a sentencing alternative); *Mail*, 121 Wn.2d at 713 (a defendant can challenge a trial court’s failure to follow a specific sentencing provision); *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, *amended* 718 P.2d 796 (1986) (a defendant can challenge the procedure by which a sentence within the standard range is imposed); *State v. McGill*,

112 Wn. App. 95, 100, 47 P.3d 173 (2002) (sentencing court erred when it failed to recognize it had authority to impose an exceptional sentence); *State v. Garcia Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997) (failure to consider an exceptional sentence downward).

None of the above factors are present in this case. At the time of sentencing, it was agreed that Mr. Campbell had an offender score of “8,” and his standard sentencing range was 81 months to 108 months incarceration for the attempted first degree robbery conviction. RP 336, 338. In addition, it was also jointly agreed that an additional 24 months, as opposed to 12 months, would be added to the sentencing range for the deadly weapon enhancement.⁵ RP 336-38. The State requested a sentence of 90 months in addition to the mandatory 24-month weapon enhancement for a total determinate sentence of 114 months. RP 336-337.

⁵ RCW 9.94A.533(4) governs sentencing enhancements for the use of deadly weapons in the commission of a crime. The statute requires enhancements of two years (24 months) for the use of a deadly weapon in a class A felony, RCW 9.94A.533(4)(a), and one year (12) months for the use of a deadly weapon in the commission of a class B felony, RCW 9.94A.533(4)(b). The statute also provides that any such sentencing enhancement shall be *doubled* when a defendant has previously been sentenced for a deadly weapon enhancement. RCW 9.94A.533(4)(d). An attempt to commit first degree robbery is a class B felony. RCW 9A.28.020(3)(b).

Thereafter, the defense attorney stated, in part, the following:

[DEFENSE ATTORNEY]: With regards to the sentencing range from the defense, I think there are a couple of things that come into factor. One, this was a self-defense case, and a failed self-defense is a grounds for some mitigation. It was our position at trial and still is our position that Mr. Campbell was not the first aggressor. That is also listed as a reason for mitigation.

I agree the state is right that the second-degree assault does add two points as opposed to one. And that I previously had seen and Ms. Zappone showed me a certified copy today that there was a previous enhancement, so we are on the 24-month instead of the 12-month.

Defense is recommending that the Court go to the low end, which is 81 months. And obviously the enhancement takes us to 105.

Part of that, Your Honor, Mr. Campbell has a pair of certificates he would like the Court to see that he's been using his time out at Geiger wisely. If I may approach.

THE COURT: Yes.

[DEFENSE ATTORNEY]: One is the leadership course and the other is the financial education course.

THE COURT: Yes. Thank you.

MR. DRESSLER: Thank you, Your Honor.

[DEFENSE ATTORNEY]: While Mr. Campbell has been out at Geiger he has been putting his time to worthwhile endeavors. Your Honor, based upon what Mr. Campbell has achieved, both in custody and the reasons that we put forth, we believe the Court should go with the low end of 81

months which then has the 24 months, which is still quite a healthy sentence all things considered.

RP 338-39 (emphasis added).

Thereafter, the trial court pronounced Mr. Campbell's sentence, in part, stating:

The Court having heard the comments with regard to sentencing including the issue of restitution, I have reviewed the state's sentencing brief, I would concur that the Counts I and II merge. I have signed the order merging those counts. I will sentence to the higher count, the attempted robbery in the first degree.

I also concur and understand that the enhancements the jury found on the special verdict, being armed with a deadly weapon and what impact that will have in terms of sentencing.

As we all know in the system, the jury has made their ruling or made their decision. The sentencing that then takes place is based upon the seriousness of the crime and the number of points the defendant has. And the grid indicates to us that the range is the 81 to 108 months. Presumptively we look to the mid[-]point, which again has to be in the 94 to 95 range in this particular case. And then the Court can consider whether moving up or down from sort of that starting point is appropriate, and that is within the Court's discretion.

It seems to the Court that the request made by the state is appropriate and reasonable, and seems like that's the appropriate sentence in this particular case, and I will adopt that position of 90 months. The 24 months follows, of course, consecutive to that, then for the total of 114 months. I'll order that.

RP 341-42.

Mr. Campbell acknowledges in his brief that at sentencing, his lawyer requested a low-end standard range sentence of 81 months, but asserts on appeal that the trial court failed to mitigate his sentence below the standard range in the form of an exceptional sentence downward. *See* App. Br. at 3-4. Defense counsel argued for a sentence at the low-end of the standard range and supplied the court with achievement materials and a passing reference to a failed defense argument in support of a low-end sentence, but did not request an exceptional sentence. It is unclear how the trial court abused its discretion by not imposing an exceptional sentence downward when such a sentence was never requested or argued by the defense.⁶

Likewise, Mr. Campbell does not allege a constitutional error, procedural error, an error of law, or specifically how the trial court failed to exercise its discretion. The trial court stated it heard the counsels' remarks with regard to sentencing and acknowledged it had discretion to impose a sentence within the standard range, and that the sentence recommendation made by the deputy prosecutor was appropriate and reasonable in this particular case. Consequently, the trial court did exercise its discretion in

⁶ With regard to Mr. Campbell's achievements while in the Geiger facility and awaiting trial, this Court held in *Medrano*, 80 Wn. App. at 112, that post-conviction activity cannot be used as a mitigating factor because it does not relate to the circumstances of the crime.

declining to impose a low end sentence and it also followed all proper statutory and constitutional procedures when imposing Mr. Campbell's sentence. Moreover, Mr. Campbell has failed to provide any substantive facts that the trial court did not consider his failed self-defense claim as a mitigating factor when it imposed the sentence. Inferentially, the trial court certainly could have rejected a mitigated sentence based upon the defendant's failed self-defense claim, just as the jury did, which was founded upon the evidentiary improbabilities of Mr. Campbell's testimony at the time of trial. For instance, Mr. Campbell alleged the victim's knife cuts about her body were inadvertently caused by the knife he was holding at the time of the event. Likewise, he claimed he dropped the knife in plain view in the apartment before he fled the area. The knife was not observed or recovered by law enforcement shortly after the event.

Mr. Campbell has not demonstrated the trial court refused to exercise its discretion.⁷ Accordingly, this Court should not consider the issue on appeal.

⁷ Although not present here, an appellate court may review a sentence where a defendant requests an exceptional sentence below the standard range if the court abused its discretion by either refusing to exercise its discretion or relied on an impermissible basis for refusing to impose an exceptional sentence. *See, e.g., State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000).

V. CONCLUSION

The State respectfully requests this Court affirm the judgment and sentence as Mr. Campbell has not established any error.

Dated this 8 day of June, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

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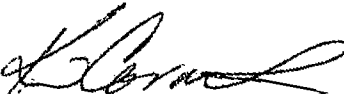
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington,
that on June 8, 2017, I e-mailed a copy of the Brief of Respondent in this matter,
pursuant to the parties' agreement, to:

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6/8/2017
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SPOKANE COUNTY PROSECUTOR

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